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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 JOHN MONTUE,

11 Petitioner,

No. CIV S-98-1580 LKK JFM P

12 vs.

13 G. A. MUELLER, et al.,

14 Respondents.

ORDER

15 \_\_\_\_\_/  
16 Petitioner is a state prisoner proceeding pro se with this challenge to a 1997  
17 decision of the California Board of Prison Terms denying him a parole date. This matter is  
18 before the court on petitioner's motion for a certificate of appealability, for appointment of  
19 counsel, and for an extension of time to file a notice of appeal from this court's August 24, 2005  
20 order.

21 This action commenced in August 1998 and proceeded to judgment on the merits  
22 of the claims raised in petitioner's amended petition. Judgment was entered on March 16, 2001.  
23 Petitioner appealed the judgment, which was affirmed by the United States Court of Appeals for  
24 the Ninth Circuit in an order filed in that court on October 10, 2002.

25 On December 9, 2004, petitioner filed a document styled as a "Motion to Expand  
26 Rule 60(b) of the Federal Rules of Civil Procedure After Judgment and Request for

1 Reconsideration of His Petition Under 28 U.S.C. § 2241 be Granted. . . .” By notice filed  
2 December 17, 2004, the court set a briefing schedule on the motion.

3           On February 1, 2005, petitioner filed an amended motion for reconsideration.  
4 That motion superseded petitioner’s previous motion. On August 24, 2005, this court adopted in  
5 full the magistrate judge’s findings and recommendations that petitioner’s amended motion be  
6 construed as a second or successive habeas corpus petition and, so construed, that it be dismissed  
7 because the United States Court of Appeals for the Ninth Circuit had denied petitioner’s request  
8 for authorization to proceed with a second or successive habeas corpus application.

9           On September 2, 2005, petitioner filed a motion for reconsideration of the court’s  
10 September 2, 2005 order, together with a proposed habeas corpus petition pursuant to 28 U.S.C.  
11 § 2241. On September 20, 2005, this court denied that motion. On September 30, 2005,  
12 petitioner timely filed a notice of appeal from the September 20, 2005 order. On October 6,  
13 2005, petitioner filed a request for a certificate of appealability, and on October 20, 2005,  
14 petitioner filed a request for an extension of time to file a notice of appeal from the August 24,  
15 2005 order, together with a notice of appeal, a motion for appointment of counsel, and an  
16 amended motion for a certificate of appealability.

17           In accordance with relevant provisions of Rule 4(a) of the Federal Rules of Civil  
18 Procedure, a notice of appeal must be filed thirty days from entry of the order appealed from.  
19 See Fed. R. App. P. 4(a)(1). When a Rule 60 motion is filed within ten days from entry of an  
20 order, the time for filing a notice of appeal from the original order is thirty days from entry of the  
21 order resolving the Rule 60 motion. See Fed. R. App. P. 4(a)(4).

22           Here, petitioner’s motion for reconsideration of this court’s August 24, 2005 order  
23 was filed within ten days of entry of that order. In accordance with Fed. R. App. P. 4(a)(4), the  
24 deadline for filing a notice of appeal from the August 24, 2005 order was therefore thirty days  
25 after entry of the order resolving the motion for reconsideration. As noted above, that order was  
26 filed on September 20, 2005. Petitioner’s October 20, 2005 notice of appeal from the August 24,

1 2005 order is therefore timely and his motion for an extension of time to file a notice of appeal  
2 will be denied as unnecessary.<sup>1</sup>

3 Petitioner also seeks a certificate of appealability. Since this action arises from  
4 the denial of a parole date, no certificate of appealability is required. See Rosas v. Nielsen, 2005  
5 WL 2898068, \_\_ F.3d \_\_, (9<sup>th</sup> Cir. Nov. 4, 2005). Petitioner's October 20, 2005 motion will  
6 therefore be denied as unnecessary.<sup>2</sup>

7 Finally, petitioner has filed a motion for appointment of counsel. The motion will  
8 be denied without prejudice to its renewal, as appropriate, in the United States Court of Appeals  
9 for the Ninth Circuit.

10 In accordance with the above, IT IS HEREBY ORDERED that:

11 1. Petitioner's October 20, 2005 motion for a certificate of appealability is denied  
12 as unnecessary;

13 2. Petitioner's October 20, 2005 motion for an extension of time to file a notice  
14 of appeal is denied as unnecessary;

15 3. Petitioner's October 20, 2005 motion for appointment of counsel is denied  
16 without prejudice to its renewal in the United States Court of Appeals for the Ninth Circuit; and

17 4. The Clerk of the Court is directed to process petitioner's September 30, 2005  
18 and October 20, 2005 notices of appeal to the United States Court of Appeals for the Ninth  
19 Circuit.

20 DATED: March 10, 2006.

21  
22 /s/Lawrence K. Karlton  
UNITED STATES DISTRICT JUDGE

23 /mont1580.app

24 \_\_\_\_\_  
25 <sup>1</sup> Petitioner's September 30, 2005 notice of appeal from the September 20, 2005 order is  
also timely.

26 <sup>2</sup> The October 20, 2005 motion supersedes the October 6, 2005 request.